ESTATE OF ROSE HYSON HARDICK SPARLIN

IBIA 90-66 Decided January 11, 1991

Appeal from an order affirming order approving will and decree of distribution after rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 200 P 87-1.

Vacated and remanded.

1. Indian Probate: Hearing: Notice--Indian Probate: Notice of Hearing: Generally

Although there is a presumption that notice sent to a party at his or her last known address and not returned has been received, when the party shows that the address used was not his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice.

APPEARANCES: Jack B. Wilkins, Esq., Oklahoma City, Oklahoma, for appellant; Barry T. Rice, Esq., Edmond, Oklahoma, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Appellant Richard Hyson seeks review of a January 31, 1990, order affirming order approving will and decree of distribution after rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Rose Hyson Hardick Sparlin (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this case for a full hearing on the merits.

Background

Decedent, an unallotted Pawnee, died on April 3, 1987. Judge Taylor held a hearing to probate her trust or restricted estate on March 23, 1988. At that hearing, Carole Jane Bell Hinkle, decedent's niece (appellee), introduced a will executed by decedent on April 17, 1984. Appellee was the sole beneficiary under that will. Appellant was not present at the March 1988 hearing, which was non-adversarial.

On December 16, 1988, Judge Taylor entered an order in which he found that, had she died intestate, decedent's heirs would have been her two

sisters, Alice Jane Hyson and Sadie Opal Hyson; appellant, the son of decedent's previously deceased brother Frank Hyson; and Charles F. Hyatt, the son of decedent's previously deceased sister Adah Hyson Hyatt. Judge Taylor, however, approved decedent's 1984 will, so that all of decedent's trust or restricted estate passed under its terms to appellee.

Appellant filed a timely petition for rehearing in which he alleged that he did not receive notice of the March 1988 hearing. Appellant indicated that he wished to contest the will. Appellee opposed rehearing on the grounds that appellant must be presumed to have received actual notice of the hearing because notice was mailed to him at his mother's address, none of the letters sent to appellant were returned as unclaimed or undeliverable, and appellant called Judge Taylor after the hearing inquiring as to the status of the probate. Appellee further alleged that appellant filed the petition for rehearing only after she requested that he pay a debt owed to decedent on a promissory note.

Judge Taylor held a hearing in response to appellant's petition for rehearing on July 13, 1989. At that hearing, only appellee and those individuals who had filed affidavits in support of appellant's petition were allowed to testify. Neither the will scrivener nor a witness to the will who had testified at the March 1988 hearing testified at the July 1989 hearing.

By order dated January 31, 1990, Judge Taylor affirmed his order approving decedent's will. The order stated at pages 1-2:

> Notice of the hearing held on March 23, 1988, was mailed to the appellant at his last known address more than 20 days prior to said hearing. The Notice was not returned by the U.S. Post Office. It is also noted that the address to which it was mailed is the address of appellant's mother and is within one-half mile of appellant's actual residence. Accordingly, it is presumed that appellant did receive said Notice.
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> Appellant relies principally upon the fact that decedent was 83 years old and was suffering from a backache when she made said Will as evidence that she lacked testamentary capacity. None of the evidence introduced at either hearing herein supports such allegation. The medical records indicate that she was able to intelligently converse with the doctors on April 17, 1984; and she obviously was able to ride in a car rather than an ambulance, and apparently capable of conversing with the appropriate agency personnel to make and execute her Will.

Appellant filed an appeal with the Board. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

Appellant contends that he was denied due process in this matter because he did not receive notice of the original hearing and was not permitted to present all of his evidence in the hearing held in response to his petition for rehearing. The Board agrees.

[1] Judge Taylor properly held that notice sent to a party's last known address and not returned is presumed to have been received. See, e.g., Estate of Ella Sarah Case Barnes, 17 IBIA 72, 74 (1989), and cases cited therein. That presumption is, however, rebuttable. The Board has previously held that when a party shows that notice was sent to an address other than his or her correct current address and specifically contests receiving notice, the presumption cannot operate to prove receipt of notice. See Estate of Everett Cozad, 13 IBIA 185 (1985).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 Judge Taylor's December 16, 1988, and January 31, 1990, orders are vacated and this matter is remanded to him for a full hearing on the merits.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge